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91-974

Supreme Court, U.S.
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No. 91-____

In The
SUPREME COURT OF THE UNITED STATES

October Term, 1991

ROBERT LEE HOLLAND,

Petitioner,

v.

FIRST VIRGINIA BANKS, INC.

and

DONALD BRENNAN,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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Questions Presented

1. Should this Court remand this case for reconsideration in light of the enactment of the Civil Rights Act of 1991, which confirms petitioner's right to the jury verdict he received for his claim under 42 U.S.C. §1981 for discriminatory discharge from his employment?

2. Have the courts of appeal systematically misapplied this Court's decision in Patterson v. McLean Credit Union, 491 U.S. 164 (1989), to bar claims for racially discriminatory discharge, thereby overruling settled law on their own authority and injuring victims of discriminatory discharges whose claims arose between the time Patterson was decided and the enactment of the Civil Rights Act of 1991?

Parties to the Proceeding

The names of all the parties appear in the caption.

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Opinions Below

The opinion of the United States Court of Appeals for the Fourth Circuit is unpublished. It is reprinted as Appendix A. The memorandum opinion of the United States District Court for the Eastern District of Virginia on the Title VII claims in the case is published as Holland v. First Va. Banks, Inc., 744 F. Supp. 722 (E.D. Va. 1990). It is reprinted as Appendix B.

Jurisdiction

The decision of the court of appeals was entered on July 12, 1991. On August 20, 1991, the court of appeals handed down an order denying petitioner's timely motion for reconsideration in banc, construed as a motion for reconsideration with suggestion for rehearing in banc. The court's order is reprinted as

Appendix C. Petitioner filed a timely motion for an extension of time within which to file the instant petition, which was granted by order of the Chief Justice dated October 29, 1991. This order appears herein as Appendix D. Petitioner invokes this court's jurisdiction under 28 U.S.C. §1254(1).[1]

Statutory Provisions Involved

As amended by the Civil Rights Act of 1991, 42 U.S.C. §1981 reads in its entirety as follows:

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[1]On November 22, 1991, the day following the enactment of the Civil Rights Act of 1991, Mr. Holland filed a motion in the court of appeals seeking recall of the mandate for the purpose of obtaining the relief now sought here. Thereafter, on November 27, 1991, Mr. Holland filed an application with the Chief Justice seeking an extension of time for the filing of the instant petition pending the Fourth Circuit's action on the motion to recall mandate. This application was denied on December 11, 1991. As of the time this petition is being completed, the Fourth Circuit has not acted on the petition to recall mandate.

(a) All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

(b) For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification and termination of contracts, and the enjoyment of all benefits, privileges, terms and conditions of the contractual relationship.

(c) The rights protected by this section are protected against impairment by non-governmental discrimination and impairment under color of state law.

Statement of the Case

Petitioner Robert Lee Holland, an African-American formerly employed by respondent bank holding company as a main-

tenance man, was subjected by his supervisor at work, respondent Donald Brennan, to long-term racial harassment which the court of appeals styled "reprehensible," A-6. Mr. Holland went over Mr. Brennan's head to complain and was fired as a result. He sought his job back. Following consultation with the corporation's chief executive officer, the bank's senior vice president decided, for racially discriminatory reasons, not to rehire him.

Having exhausted his administrative remedies, Mr. Holland sued the bank and Mr. Brennan alleging racial harassment under Title VII of the Civil Rights Act of 1964 and discriminatory termination and refusal to rehire under Title VII and 42 U.S.C. §1981. The court had jurisdiction under 28 U.S.C. §§1331 and 1343.

The district court permitted only the §1981 rehire claim to go to the jury, holding

the discharge claim not actionable under §1981 in light of Patterson v. McLean Credit Union, 419 U.S. 164 (1989). The court gave strict instructions, upheld on appeal, expressly disallowing an award of damages for harassment or discriminatory discharge and permitting an award of damages only for discriminatory failure to rehire.

The jury returned a verdict in favor of Mr. Holland in the amount of $20,000 actual damages, $1,000 punitive damages against Mr. Brennan (who had played a minor role in the rehire decision) and $500,000[2] punitive damages against the bank, a $5.2 billion corporation. One week later, the court entered findings of fact and conclusions of law holding that the bank had violated Mr. Holland's

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[2]The reference to $50,000 in the appellate opinion, A-3, is a typographical error.

rights under Title VII by the harassment, the discharge, and the refusal to rehire.

As it happened, Mr. Holland had been seriously injured at work at exactly the time he was fired by Mr. Brennan. He remained unable to work through trial, and remains disabled and unemployable today. At trial, he was thus unable to avail himself of reinstatement or back pay as remedies under Title VII. Accordingly, Mr. Holland confined his request for Title VII relief to nominal damages and declaratory relief, which the court awarded him the week following trial.

The bank accepted the Title VII judgment and appealed the §1981 decision only, seeking expedited review which it obtained. The bank argued that its refusal to rehire Mr. Holland was indistinguishable from his discharge, which the district court had held did not give rise to a claim under §1981. In opposition,

Mr. Holland defended the integrity of the jury's rehire verdict, and in the alternative argued that the damage award could be upheld as an award for the established (and unappealed) discriminatory discharge, which the bank asserted was indistinguishable from the refusal to rehire.[3]

In its decision, the Fourth Circuit held that Mr. Holland had not proved a failure to rehire but only a termination, which the court held was not actionable under §1981 in light of Patterson. In so deciding, the court overruled the decision of a jury which had been expressly instructed to the effect that:

> The Civil Rights Act, pursuant to which the civil rights claim is made, does not prohibit racial harassment on the job, or racially

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[3]Since the bank had taken the position that what Mr. Holland had proved at trial was a discriminatory discharge, not a separate refusal to rehire, granting a cause of action for discharge would have sufficed to save Mr. Holland's verdict on appeal.

> motivated employment termination.... [I]t is only the alleged failure to reinstate the plaintiff that can be the subject of plaintiff's civil rights claim.[4]

Accordingly, in a decision violating the rule of Anderson v. Bessemer City, 470 U.S. 564 (1985), the court reversed the jury's §1981 decision in Mr. Holland's favor.

On November 21, 1991, the President signed into law the Civil Rights Act of 1991, returning §1981 jurisprudence to its pre-Patterson status. Mr. Holland's case had been adjudicated through an expedited appeal, however, shortly before this development. Mr. Holland now seeks relief from this Court for the reasons set forth below.

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[4]The court of appeals expressly rejected the bank's objections to the jury instructions.

Reasons for Granting the Writ

I. This Case Should be Remanded for Adjudication on the Basis of the Governing Law

This Court should grant certiorari for the purpose of vacating the decision below and remanding the case for reconsideration in light of the Civil Rights Act of 1991, which has already been held applicable to pending cases. Mojica v. Gannett Company, Inc., No. 90-C-3827 (N.D. Ill. Nov. 27, 1991); LaCour v. Harris County, No. 89-1532 (S.D. Tex., Dec. 6, 1991).[5] Under the new law petitioner Holland is absolutely entitled to the judgment he won below.

Persons in Mr. Holland's position currently stand doubly victimized in a legal no-

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[5]Another decision on the applicability of §1981 to pending cases is anticipated momentarily in the case of Van Meter v. Barr, No. 91-0027-GAG (D.D.C., argued Dec. 9, 1991).

man's land, between an appellate jurisprudence which denies them their judgments, and a new statute whose application to their case they cannot compel as a matter of right, but must obtain by the grace of this Court. Barring recall of the appellate mandate (which petitioner has requested[6]), only this Court's decision to grant certiorari can vindicate these rights.

The instant case, arising out of "reprehensible" discrimination, A-6, which occurred, legally, at the "wrong time" for petitioner, is particularly appropriate for reconsideration in light of the new law. In Brown Group, Inc. v. Hicks, 111 S.Ct. 1299 (1991), this Court vacated and remanded an Eighth Circuit panel decision regarding the scope of §1981 for reconsideration in light of

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[6]See supra n.1 at 2.

an anticipated in banc decision of the Eighth Circuit addressing that subject. See also Blaauw v. Grand Trunk West. Ry. Co., 380 U.S. 127 (1965) (vacating and remanding for reconsideration in light of an intervening state court decision) The same result should obtain here. As there is yet no "final decision" in this case, Bradley v. Richmond School Bd., 416 U.S. 696, 71 n.14 (1974), this Court is free to effectuate the purpose of the law and rectify the damaging quirk of fate that has taken away petitioner's judgment.

II. The Court Should Correct the Systematic Misapplication of its Decision in Patterson v. McLean Credit Union

This Court should, alternatively, grant certiorari in order to review systematic misapplication of this Court's decision in Patterson v. McLean Credit Union, 491 U.S. 164

(1989), in the period prior to enactment of the Civil Rights Act of 1991. Unlike all similar claimants for one quarter century before that time and all such claimants thereafter, petitioner and those similarly situated stand in the unique position of having had important federal rights, long honored in this Court, truncated at the appellate level without mandate from this Court and against the intent of Congress, all based on a misapplication of this Court's decision in Patterson. This inappropriate result should be corrected by this Court.

If this Court does not reach out to adjudicate whether discriminatory discharge claims were actionable for two years prior to the passage of the 1991 Civil Rights Act, the dispositive word on the subject will have been given, finally, unreviewably, and incorrectly,

by an appellate judiciary visibly uncertain of the propriety of its decisions.

A. This Court Should Correct the Misapplication of its Ruling in Patterson

In Patterson v. McLean Credit Union, 805 F.2d 1143, 1145 (4th Cir. 1986), aff'd, 491 U.S. 164 (1989), the Fourth Circuit held that claims of racial harassment at work fell outside the scope of §1981. In contrast, the court observed:

> Claims of racially discriminatory hiring, firing, and promotion go to the very existence and nature of the employment contract and thus fall easily within §1981's protection.

This Court affirmed. In so doing, this Court did not have to address whether the Fourth Circuit was correct in finding that discriminatory discharges were actionable under §1981 -- a settled proposition of law in any regard. See generally, Hicks v. Brown

Group, Inc., 902 F.2d 630, 637-38 & n.18 (8th Cir. 1990) (citing authority), vacated, 111 S. Ct. 1299 (1991). While this Court used language permitting an interpretation that no conduct taking place after the initial formation of a contract was actionable under §1981, it seems clear that what this Court had in mind was precisely the distinction expressly drawn by the Fourth Circuit in the case then being affirmed: between actions like hiring and termination, which "go to the very existence and nature of the employment contract," id., and actions regarding what comes in between i.e., conditions of employment:

> Such postformation conduct does not involve the right to make a contract, but rather implicates the performance of established contract obligations and the conditions of continuing employment, matters more naturally governed by state contract law and Title VII.

Patterson, 491 U.S. at 177 (emphasis added).

The broad "post contract formation" language of this Court's Patterson opinion proceeded, however, to cause confusion within the judiciary. A discharge is concededly "post-formation conduct," although it does not implicate "the performance of established contract obligations and the conditions of continuing employment," but rather addresses "the very existence and nature" of the contractual relationship. Accordingly, this Court's Patterson decision could be, and was, interpreted in one of two ways in discharge cases. Courts focusing on the Fourth Circuit's opinion, affirmed by this Court, allowed discriminatory discharge claims on the same basis as the Fourth Circuit had done in its own Patterson decision affirmed by this Court.[7] Those

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[7]See e.g., Hicks v. Brown Group, Inc., 902 F.2d 630 (8th Cir. 1990), remanded, 111 S. Ct. 1299 (1991); Carroll v. Elliott Personnel Serv., 52 Empl.Prac.Dec. (CCH) ¶39,508 at 60,288 (D.Md. 1989); Padilla v. United Air

courts focussing on this Court's "postformation" terminology, on the other hand, rejected such claims.[8] As of the time that the President signed the Civil Rights Act of 1991, ending any prospective controversy on the issue, every circuit to have reached the

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Lines, 718 F.Supp. 485, 490 (D. Colo. 1989); McGinnis v. Ingram Equip. Corp., 918 F.2d 1421, 1426 (11th Cir. 1990).

[8]Taggart v. Jefferson Co. Child Support Enforcement Unit, 935 F.2d 947 (8th Cir. 1991); Gersman v. Group Health Ass'n, Inc., 931 F.2d 1565 (D.C. Cir. 1991); Trujillo v. Grand Junction Regional Center, 928 F.2d 973, 976 (10th Cir. 1991); Williams v. First Union Nat'l Bank, 920 F.2d 232, 233-34 (4th Cir. 1990), cert. denied, 111 S. Ct. 2259 (1991); Prather v. Dayton Power & Light Co., 918 F.2d 1255, 1256-58 (6th Cir. 1990), cert. denied, 111 S. Ct. 2889 (1991); Thompkins v. DeKalb County Hosp. Auth., 916 F.2d 600, 601 (11th Cir. 1990); Gonzalez v. Home Ins. Co., 909 F.2d 716, 722 (2d Cir. 1990); McKnight v. General Motors Corp., 908 F.2d 104, 108-09 (7th Cir. 1990), cert. denied, 111 S. Ct. 1306 (1991); Courtney v. Canyon Television & Appliance Rental, Inc., 899 F.2d 845, 849 (9th Cir. 1990); Lavendar v. V & B Transmissions & Auto Repair, 897 F.2d 805, 807-08 (5th Cir. 1990).

issue, finding itself bound by this Court's language, had denied relief under §1981 for claims of discriminatory termination.[9]

The circuit courts fell into line solely on the basis of their unguided determination that this Court's language elaborated in a suit challenging conditions of employment must be applied literally, including to conduct terminating the contractual relationship itself. With no other analysis whatever, a quarter century of settled law in each of the circuits at issue was summarily reversed.

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[9]For its part, this Court on at least two occasions permitted post-Patterson discriminatory discharge claims to proceed under §1981, rather than remanding them for reconsideration in light of that decision. Lytle v. Household Mfg. Co., 494 U.S. 545 (1990); Jett v. Dallas Indep. School Dist., 491 U.S. 701 (1989). A third case, Brown Group, Inc. v. Hicks, 111 S. Ct. 1299 (1991), was remanded for reconsideration by the Eighth Circuit in light of a pending decision regarding the scope of §1981. See discussion supra at 10.

The Fourth Circuit, where Patterson originated, is a case in point. Numerous courts both within and outside the Fourth Circuit had cited the Fourth Circuit's Patterson decision as authority for the proposition that following this Court's decision in that case, claims of racially discriminatory termination remained viable under §1981. See, e.g., McGinnis v. Ingram Equip. Corp., 918 F.2d 1421, 1426 (11th Cir. 1990); Hicks v. Brown Group, Inc., 902 F.2d at 636; Padilla v. United Air Lines, 718 F.Supp. 485, 490 (D. Colo. 1989); Carroll v. Elliott Personnel Serv., 52 Empl.Prac.Dec. (CCH) ¶39,508 at 60,288 (D.Md. 1989). Nevertheless, in Williams v. First Union Nat'l Bank, 920 F.2d. 232 (4th Cir. 1990), cert. denied, 111 S. Ct. 2259 (1991), a panel of the Fourth Circuit held, simply on the basis of a head-count of reported post-Patterson §1981 decisions, that discrimina-

tory discharge claims were not cognizable under Patterson. So much for what shortly before had been seen to "fall[] easily within §1981's protection."

The history of §1981 in the Eighth Circuit is equally instructive. In Hicks v. Brown Group, Inc., 902 F.2d 630 (8th Cir. 1990), an appellate panel upheld the viability of a post-Patterson discriminatory discharge claim under §1981. After the defendant petitioned for a writ of certiorari, 59 U.S.L.W. 3167 (Aug. 21, 1990), this Court solicited the views of the United States on the matter. 111 S. Ct. 578 (1990). In the meanwhile, the question of whether §1981 barred discriminatory discharge in light of Patterson had reached a second panel of the Eighth Circuit. That panel, properly considering itself bound by the panel decision in Hicks, permitted the claim even as it expressed its view that this

result was untenable in light of this Court's language in Patterson. Taggart v. Jefferson Co. Child Support Enforcement Unit, 915 F.2d 396 (8th Cir. 1990). The defendant in Taggart sought in banc review of this decision, which was granted. Following the Eighth Circuit's grant of rehearing in banc, and before the decision came down in that case, this Court thereupon vacated the panel decision in Hicks for reconsideration in light of the anticipated in banc decision in Taggart. 111 S. Ct. 1299 (1991). The Eighth Circuit finally decided, in banc, that §1981 does not cover discriminatory discharges. Taggart, 935 F.2d 947 (8th Cir. 1991).

The Eighth Circuit's opinion in this matter is based expressly on a head-count of other decisions so holding. In the court's words following its string citation, 935 F.2d at 948:

> Contrary to Judge McMillan's reasoned opinion in Brown Group, the circuit courts of appeal have unanimously held Patterson forecloses discriminatory discharge claims under section 1981. If the Patterson precedent is to be revisited, it is the prerogative of the Supreme Court to do so, not the courts of appeals.

On few if any other questions of federal law has the appellate judiciary ever worked such a rapid revolution in established legal doctrine, without express mandate from this Court, as it did during the months between this Court's Patterson decision and the enactment of the 1991 Civil Rights Act on the issue of whether §1981 does or does not prohibit racially discriminatory discharges. What is remarkable about the debate, as memorialized in the opinions antedating the eventual unanimity among the circuits, is the lack of parity between the sources used by the debaters. Decisions finding a cause of action for dis-

charge appeal to historical analysis, records of Congressional debates and hearings,[10] ordinary rules of statutory construction, common sense, and decades of settled jurisprudence in this Court and below. See, e.g., Hicks, 902 F.2d 630. Decisions denying the claim rest exclusively on broad language from Patterson not addressing the point at issue, and a head-count of decisions denying the claim for the same reason and no other. See cases cited supra at 16 n.8.

As an alternative to remanding this case to the Fourth Circuit for reconsideration in light of the new act, this Court, as the final arbiter of federal law, should grant certiorari for the purpose of retrieving from the

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[10]These sources may be contrasted with contemporary "legislative histories" created after-the-fact by competing partisans for the purpose of swaying the judiciary in subsequent cases.

circuit courts the last word on this important subject, which as currently stated is both wrong and unreviewable as a matter of right. The court should correctly state the law and thereby vindicate the rights of persons discriminatorily discharged at the legally "wrong" time, whose rights have been improperly cut off, in derogation of the will of Congress and without mandate from this Court.

B. The Court Should Act to Preserve the Integrity of Conventional Rules of Statutory Construction Nullified by the Proposition that §1981 Did Not Prohibit Discriminatory Discharge

Pre-amendment §1981 provided, in pertinent part, that:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens....

The determination that this language did not prohibit racially discriminatory breach of contract and merely guaranteed equal access to the courts for contract claims makes a travesty of ordinary principles of statutory construction. The literalist approach which gives rise to it suggests the prospect of judicial nullification of untold other statutory protections which, while manifestly implied, are not stated in so many words.

1. Rights Which Go To The "Very Existence and Nature" of a Right Expressly Protected by Statute are Also Protected

A statute granting certain rights bars not merely expressly proscribed interference therewith, but also unspecified conduct that necessarily nullifies exercise of the expressly protected right. Otherwise, one ends up with the equivalent of Shylock's illusory

right to his pound of flesh on the condition that he spill no blood getting it. In the Fourth Circuit's words in a decision affirmed by this Court, the law protects what goes "to the very existence and nature" of the expressly protected right. Patterson, 805 F.2d at 1145.

Numerous forms of discriminatory behavior were and remain plainly prohibited by §1981 although they are not specifically mentioned in the law. Thus, the statute does not expressly protect against having suits, once brought, dismissed if brought by non-whites against white persons. Such conduct is nevertheless plainly prohibited as part of the protection of the right of non-whites "to sue" -- a right that would be meaningless if construed to protect merely the right to file a lawsuit, and not the right to maintain a suit, once brought. Likewise, §1981 does not ex-

pressly prohibit jury instructions that the word of a white person must be accepted over that of a non-white. Clearly, however, such instructions would be impermissible given the express grant of the right "to give evidence." The latter includes the former by necessary implication.

In these cases, it is of no moment that prohibition of the discriminatory conduct at issue is not expressly identified. The unnamed action goes "to the very existence and nature" of the expressly protected right, Patterson, 805 F.2d at 1145, and is necessarily included as part of it.

There is no reason to view the pre-amendment grant of the right "to make and enforce contracts" differently, as the Fourth Circuit held in its Patterson opinion, affirmed by this Court. Nevertheless, the appellate judiciary proceeded to abrogate the right under

§1981 not to suffer a discriminatory discharge, in light of broad language in this Court's Patterson opinion unnecessary to its holding. The courts of appeals thereby eviscerated the right to maintain the very employment, the right to obtain which had been established by the same statute.[11] This makes no sense.

One hundred fifty years ago, This Court observed as follows, in upholding the right of slaveholders to regain their human property in free states:

> If by one mode of interpretation the right must become shadowy and unsubstantial, and without any remedial power adequate to the end, and by another mode it will attain its just end and secure its manifest purpose, it would seem, upon principles of reasoning, absolutely irresistible that the latter ought to prevail.

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[11]Under the appellate construction of §1981, an employer seeking to avoid liability under the statute for discriminatory refusal to hire could hire an employee on day one and fire him on day two.

> No Court of justice can be authorized so as to construe any clause of the Constitution as to defeat its obvious ends, when another construction, equally accordant with the words and sense thereof, will enforce and protect them.

Prigg v. Pennsylvania, 41 U.S. (16 Pet.) 539, 612 (1842). This apt analysis, offered by the Court in regard to an unjust law, should control its construction of the beneficent law here at bar.

2. Absent a Prohibition of Discriminatory Breaches of Contract, The Right to "Enforce Contracts" is Meaningless

In post-civil war America as now, most employees, including the freed slaves, were employed at will. Absent a term labor contract, which was not the rule, termination of employment of a freed slave or any other employee was not actionable by the employee. An employee who was unfairly discharged had a contract terminated but did not have it

breached. The employee had no legal claim against the employer for such an event.

Furthermore, absent a prohibition on racially discriminatory contract termination, the right to benefit from contracts, once made, free from racial discrimination could not be enforced merely by the new right "to sue." For there would be no cause of action on which to bring suit. Under the current appellate construction of pre-amendment §1981, the right of a victim of a discriminatory discharge to "enforce" a contract thus emerges as meaningless. So too does the new right "to sue," as regards discriminatory discharge. One could file a suit, but it would state no claim upon which relief might be granted.

The limited construction of pre-amendment §1981 also yields the anomalous result that the extension of the right to "enforce contracts" is surplusage which carries no legal

consequence. For if by "enforcement" is meant simply enforcement in court, it amounts to exactly the same thing as "suing," which is separately provided for in the law.

It is not to be presumed that any of the various provisions of a statute are irrelevancies or redundancies, safely ignored. See New York v. Shore Realty Corp., 759 F.2d 1032, 1044 (2d Cir. 1985). Indeed, the 39th Congress was struggling to make critical federal policy in the midst of a national crisis and in the face of overt presidential hostility.[12] It is not to be lightly assumed that Congress was not exquisitely mindful of the language it chose to enact into law.

Lower court construction of pre-amendment §1981 has created a substantial, albeit dis-

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[12]The Civil Rights Bill of 1866 was passed over the veto of President Andrew Johnson.

crete, body of incorrect law with reference to one of the most litigated federal statutes. This body of law, nullifying settled jurisprudence and basic principles of statutory construction, warrants review and correction by this Court.

C. Holding that §1981 Barred Discriminatory Termination of Employment Is Not Inconsistent with Patterson

This Court's holding in Patterson is not implicated here. Racial harassment, however obnoxious, does not subvert the exercise of the right to enter into and enforce contracts conferred by Congress in 1866. This is, of course, precisely what the Fourth Circuit held in its Patterson opinion affirmed by this Court.

Congress was not concerned in 1866 with behavior that, over one hundred years later, the law has held actionable workplace harass-

ment. Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986).[13] Racist behavior was commonplace in the workplace (and society in general) well into the twentieth century. It is inappropriate to project current American sensibilities onto persons living one hundred thirty years earlier, in the very era when the slaves were being freed from their chains.

Nor would permitting discharge claims under §1981 subvert the mediation and conciliation procedures of Title VII. Noting, in

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[13]It is a commonplace of historical scholarship that white champions of African-American rights shared prevailing negative attitudes towards those whose rights they sought to secure. This juxtaposition of high principles with prejudiced attitudes and actions, from a Jefferson or Lincoln to the most modest citizen concerned with the fate of the freed slaves, is a major theme of American social and intellectual history. The literature on this subject is vast. See, e.g. Jordan, White Over Black (1968); Davis, The Problem of Slavery in Western Culture (1966); Litwack, North of Slavery (1965); Foner, Reconstruction (1988).

Patterson, that racially-based refusal to contract continued to be actionable under §1981 and Title VII, this Court was not troubled by the overlap since Title VII's remedial procedures lose significance where an employment relationship does not exist. Patterson, 491 U.S. at 182. Unlike a claim of harassment, a claim of discriminatory discharge arises, similarly, when an employment relationship no longer exists, and as a practical matter is probably less "salvageable," id., than an employment relationship which never existed in the first place.

Conclusion

The Court should issue a writ of certiorari for the purpose of remanding this case to the court of appeals for reconsideration in light of §1981 as it now reads. Alternatively, this Court should grant certiorari in

order to close the window of inequity regarding discriminatory discharges which was temporarily opened, against the will of Congress and without mandate from this Court, by the lower federal judiciary.

Respectfully submitted,

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Counsel of Record

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Counsel for Petitioner

Dated: December 16, 1991

APPENDIX

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

ROBERT L. HOLLAND,
Plaintiff-Appellee,

v.

FIRST VIRGINIA BANKS, INCORPORATED; DONALD D. BRENNAN,
Defendants-Appellants.

No. 90-2203

Appeal from the United States District Court
for the Eastern District of Virginia, at Alexandria.
Albert V. Bryan, Jr., Chief District Judge.
(CA-90-64-A)

Argued: March 4, 1991

Decided: July 12, 1991

Before ERVIN, Chief Judge, NIEMEYER, Circuit Judge, and RESTANI, Judge, United States Court of International Trade, sitting by designation.

Reversed by unpublished per curiam opinion.

COUNSEL

ARGUED: Gerald S. Hartman, ANDERSON, KILL, OLICK & OSHINSKY, Washington, D.C., for Appellants. Victor Michael Glasberg, VICTOR M. GLASBERG & ASSOCIATES, Alexandria, Virginia, for Appellee. **ON BRIEF:** Gregory W. Homer, ANDERSON, KILL, OLICK & OSHINSKY, Washington, D.C.; Kathleen T. Bar-

low, Falls Church, Virginia, for Appellants. Jeanne Goldberg, VICTOR M. GLASBERG & ASSOCIATES, Alexandria, Virginia, for Appellee.

Unpublished opinions are not binding precedent in this circuit. See I.O.P. 36.5 and 36.6.

OPINION

PER CURIAM:

Robert L. Holland filed suit in the United States District Court for the Eastern District of Virginia in January 1990 against his former employer, First Virginia Banks, Inc. (the Bank), and his former supervisor, Donald Brennan. The complaint alleged violations of Holland's rights under 42 U.S.C. § 1981; Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000 *et seq.*; and Virginia common law, predicated on Holland's having been the victim of racial harassment at work, discharged in retaliation for filing an EEOC claim on this account, and subsequently denied re-employment for the same reason.

The Bank filed a motion to dismiss Holland's claim in its entirety, arguing that the complaint failed to state a claim for relief under Section 1981 in light of the Supreme Court's pronouncements in *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989). In that case the Court held that employer conduct subsequent to the formation of the employment contract is no longer actionable under Section 1981. The district court denied the Bank's motion.

Holland's Section 1981 claims and state law claims then went to jury trial, followed by a bench trial on the Title VII claims. Responding to the Bank's motion for a directed verdict, the district court ruled that under *Patterson* Holland's claims of racial harassment and discriminatory discharge should not go to the jury, but that there was sufficient evidence to send the failure to rehire claim to the jury on the ground that the claim alleged the Bank's refusal to make a new contract with Holland.

The jury found for the Bank and Brennan on the state law emotional distress claim and for Holland on the Section 1981 claim. The jury awarded Holland $20,000 actual damages, $1,000 punitive damages against Brennan, and $50,000 punitive damages against the Bank. Subsequently, the district court entered findings of fact and conclusions of law in favor of Holland on his Title VII claims, and awarded Holland a total of $87,388.13 in costs and attorneys' fees. This figure included a 75 per cent multiplier of the lodestar amount of attorneys' fees as an enhancement for the "exceptional result" obtained.

The Bank filed post-trial motions, all denied by the district court, to obtain a judgment notwithstanding the verdict or a new trial, and to vacate the award of punitive damages or grant remittitur. This appeal followed.

I.

Holland went to work for the Bank as a maintenance employee in September 1988 after having served in the United States Army from July 1967 to January 1988. Holland's immediate supervisor at the Bank was Donald Brennan, who was responsible for the maintenance of the Bank's facilities in the Northern Virginia area and was given the power to hire and fire maintenance employees. During his ten-month employment with the Bank, Holland received good performance evaluations and a seven per cent raise.

Holland worked out of the same office as did Brennan, who supervised Holland's daily work. Holland was the first black employee in that particular facility, and early in his employment he was warned by a fellow-employee that he should be careful on that account. Within two months after Holland began work at the Bank, Brennan began to refer to Holland by racially derogatory terms such as "Chicken Little," "Watermelon Man," and "Boy." Other employees also used such terms to refer to Holland in Brennan's presence without reprimand. A sign entitled "Chicken Little" or "Love that Chicken" was placed on Holland's in-box in the office. The sign was not removed until

some three weeks after Holland complained to one Ambrosi, a Bank vice-president.[1]

Holland and fellow employees interpreted this name-calling as evidencing stereotyped concepts of the eating habits of black people. Although Holland felt demeaned and humiliated by this conduct, he did not immediately complain because he thought that this might be a form of new employee hazing which would soon cease. The offensive conduct continued, however, and was expanded to include the use of the word "nigger" in reference to Holland out of his presence. In March 1989 Holland finally complained to Brennan about the name-calling. Brennan responded that Holland was "too sensitive" and laughed off his complaint. The name-calling persisted until June 1989, when Holland complained to Shirley Beavers, a senior Bank vice-president. Beavers then questioned Brennan, who claimed he was only "kidding." Beavers instructed Brennan that the conduct Holland complained of should cease.

On June 28 a meeting was held which was attended by, among others, Holland, Brennan, and Beavers. As a result of this meeting, all parties indicated that the problems had been resolved, and Holland expressed his satisfaction with the resolution of the matter.

Shortly thereafter, the co-worker who had warned Holland to be careful on account of his race was fired. Another fellow-employee told Holland that his days were numbered at the Bank and that Brennan would not forgive him for having gone over his head to Beavers. Holland, frightened by these events, submitted an application to the Marriott Corporation for part-time work. Holland advised Brennan of his application to Marriott, as was required by the Bank's personnel policy. Holland never obtained this employment because funding problems prevented Marriott from hiring part-time employees for several months during that period.

On July 20, 1989, Holland was injured on the job. The extent of his injury's effects was not immediately apparent.[2] On July 25, Bren-

[1]Ambrosi testified that he would not have removed the sign even if it had said, "Bob Holland is a no good black son-of-a-bitch."

[2]Eventually it became clear that the injury was more serious than first appeared. As a result Holland was unable to return to the type of work he had done at the Bank.

nan called Holland at home and told him that the Bank had "accepted his resignation." Holland replied to Brennan that he had never resigned. Brennan then sent Holland a letter conveying the same message he had communicated in the phone call. Holland responded in a letter dated August 1, 1989, denying that he had resigned and requesting a thorough explanation of Brennan's intentions regarding Holland's employment with the Bank. This letter was copied to the Bank's CEO Robert Zalokar, to Beavers, and to the Virginia Equal Employment Opportunity Commission (EEOC). Beavers, whom Zalokar designated to respond to Holland's letter, informed Holland by letter of August 7 that the Bank considered that Holland had resigned.

II.

The Bank does not challenge the district court's judgment in favor of Holland's claims of racial harassment and discriminatory discharge under Title VII of the Civil Rights Act of 1964. This appeal primarily focusses on the district court's allegedly erroneous interpretation of *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989), as allowing Holland's claim of retaliatory refusal to rehire to go to the jury under 42 U.S.C. § 1981. We review the district court's conclusions of law concerning the scope of Section 1981 *de novo*.

Section 1981, enacted as part of the Civil Rights Act of 1866, provides as follows:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

42 U.S.C.A. § 1981 (1981). In *Patterson* the Supreme Court reaffirmed its holding in *Runyon v. McCrary*, 427 U.S. 160 (1976), that Section 1981 prohibits racial discrimination in the making and enforcement of private contracts. *Patterson*, *supra*, 491 U.S. at 170.

On the facts presented in *Patterson*, however, the Court narrowed the coverage of Section 1981, holding that Section 1981 does not apply to conduct, such as the racial harassment alleged by Patterson, which occurs after the formation of a contract and which does not interfere with the right to enforce established contract obligations. *Id.*, 491 U.S. at 179. The Court found that Patterson's racial harassment claim concerned the terms and conditions of her employment and did not implicate the making or enforcing of an employment contract. *Id.*, 491 U.S. at 171.

As to Holland's refusal to rehire claim, the district court reasoned that two separate contracts were involved: the contract terminated by Brennan's letter to Holland, and the subsequent contract the Bank refused to make with Holland for his rehire. The court thus found that this claim remained within the coverage of Section 1981, as long as there was evidence from which the jury could find (1) a refusal to make a new employment contract (2) that was motivated by racially discriminatory retaliation.

Our understanding of *Patterson* as seen in the light of the circumstances surrounding Holland's termination leads us to a different result. While we do not assert that *Patterson* bars all refusal to rehire claims from the reach of Section 1981, we conclude that on the facts of this case, the district court's decision to submit Holland's refusal to rehire claim to the jury under Section 1981 was reversible error.[3] Moreover, reprehensible as the Bank's conduct here may be, the

[3]Of the several federal courts which have considered the discriminatory refusal to rehire issue in light of *Patterson*, several have held that the discriminatory refusal to rehire an employee is precisely the sort of refusal to make a contract that the Supreme Court found to be actionable under Section 1981 in *Patterson*. *Williams v. Avco Lycoming*, 755 F. Supp. 47, 51 (D. Conn. 1991); *Tillman v. Beaver Express Service, Inc.*, 1991 WL 26936 at 2 (D. Kan. 1991); *Padilla v. United Air Lines*, 716 F. Supp. 485, 490 (D. Colo. 1989). Others, analogizing from the language in *Patterson* concerning promotions, have found that rehiring an employee into the same position from which he was discharged was not what the Court contemplated as a "new and distinct relation." *Smith v. Continental Ins. Corp.*, 747 F. Supp. 275, 282 (D.N.J. 1990); *Carter v. O'Hare Hotel Investors*, 736 F. Supp. 158, 160 (N.D. Ill. 1989); *Eklof v. Bramalea Ltd.*, 733 F. Supp. 935, 937 (E.D. Pa. 1989).

jury's verdict for Holland on this claim must be reversed, for the evidence is insufficient to permit a reasonable jury to find that the Bank refused to enter into a new employment contract with Holland. Fed. R. Civ. P. 52(a); *Anderson v. Bessemer City*, 470 U.S. 564, 573-74 (1985).

There is no question that Holland's employment contract with the Bank was terminated—whether by the Bank or by Holland himself, if the Bank's resignation theory is accepted. The letters exchanged between Holland and the Bank regarding that termination, however, do not support a finding that a new contract to rehire Holland was proposed and rejected. Rather, both the phrasing of Holland's August 1 letter and its timing close on the heels of the Bank's notification of Holland's termination indicate that its purpose was not to request re-employment but to clarify Holland's understanding of the Bank's actions. In the letter, Holland asked only for "a thorough explanation of your [the Bank's] intentions regarding my employment with First Virginia Banks."

Even if Holland's letter could reasonably be construed as a request for re-employment which the Bank then refused, we think that the close timing of the letters to the termination prevents us from construing the letters as initiating a contract whose formation would be contemplated by *Patterson*. To find otherwise would permit discharged employees, whose discharge is rendered not actionable under Section 1981 by *Patterson*, to sidestep *Patterson* and obtain Section 1981 coverage by immediately requesting re-employment.

III.

The Bank also alleges on appeal that the district court erroneously instructed the jury on the proper causation standard to be applied in Section 1981 cases, in that the court failed to tell the jury that a plaintiff under Section 1981 is required to demonstrate that discrimination was a "but for" cause of the adverse employment action at issue. *McDonald v. Santa Fe Trail Transportation Co.*, 427 U.S. 273, 282 n.10 (1976). The Bank claims that this omission constitutes prejudicial error, citing *Ross v. Communications Satellite Corp.*, 759 F.2d 355 (4th Cir. 1985).

We find that the Bank did not adequately articulate to the district court its objection to the causation instruction, and that therefore the right to raise this issue on appeal was waived. Were we to rule on the matter, however, we would find dispositive the Supreme Court's recent statement in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). There the Court, in considering a Title VII gender discrimination claim, stated that the "but for" language of *McDonald* does not indicate that the plaintiff must show "but for" causation in order to prevail. Rather, the Court construed this language to mean only that, if the plaintiff does meet that standard, he will prevail. 490 U.S. at 240 n.6. Thus, any error the district court committed in failing to instruct the jury concerning "but for" causation was harmless.

The Bank further appeals the district court's award of punitive damages and its enhancement of the attorneys' fees awarded. Because we reverse the jury's verdict the punitive damage award is vacated and we need not discuss the matter here. We vacate the award of attorneys' fees and remand to the district court for further consideration.[4]

The district court's submission of Holland's Section 1981 claim to the jury, and the subsequent jury verdict, are hereby

REVERSED.

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[4]We call to the district court's attention that the "exceptional result obtained" generally should not be used to provide an independent basis for increasing the attorneys' fee award. *Blum v. Stenson*, 465 U.S. 886, 897 (1984); *see also Barber v. Kimbrell's, Inc.*, 577 F.2d 216, 226 n.28 (4th Cir. 1981) ("result obtained" factor is included among factors which comprise the lodestar figure). An enhancement of this type is proper only if supported by both specific evidence on the record and detailed findings. *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air (Delaware Valley I)*, 478 U.S. 546, 565 (1986).

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA

Alexandria Division

ROBERT L. HOLLAND,	)	
	)	
Plaintiff,	)	
	)	
v.	)	C.A. #90-64-A
	)	
FIRST VIRGINIA BANKS, INC., et al.,	)	
	)	
Defendants.	)	

MEMORANDUM OPINION

This action is brought pursuant to Title VII of the Civil Rights Act of 1964, U.S.C. §§2000e et seq.[1] Testimony in the case was adduced on July 10 and 11, 1990.

---

[1]The complaint also sought recovery pursuant to 42 U.S.C. §1981 and a state law claim for intentional infliction of emotional distress. These claims were tried to a jury at the same time the court heard the Title VII aspect of the complaint. The jury found in favor of the defendant on the intentional infliction of emotional distress claim and in favor of the plaintiff on the §1981 claim. The jury awarded the plaintiff on that claim $20,000 in compensatory damages against both defendants, $1,000 in punitive damages against the defendant Brennan, and $500,000 in punitive damages against the defendant First Virginia Banks, Inc.

Findings of Fact

1. The plaintiff is a 46 year old black male who went to work for the defendant, First Virginia Banks, Inc., on September 18, 1988. He had previously served in the United States Army from July, 1967 until January, 1988. He worked for First Virginia as a maintenance employee and his immediate supervisor was the defendant, Donald Brennan, who is responsible for the maintenance of all the bank's approximately twenty-one facilities in this area. Although he is not an officer of the bank, Brennan had the power to hire and fire maintenance employees, including the plaintiff.

2. The plaintiff performed his duties in a satisfactory manner for the bank. He received good performance evaluations and a 7% raise during his period of employment.

3. The plaintiff was the first black employee in the particular maintenance section

where he worked, although there were other black employees in other facilities supervised by Brennan. The plaintiff was in the same office with Brennan and Brennan supervised his day-to-day operation. When the plaintiff first went to work in Brennan's office, he was told by a fellow-employee he should be careful since he was the first black employee in the office.

4. Within approximately forty-five days after the plaintiff began his employment, Brennan began to refer to the plaintiff as "Chicken Little," "Chicken George," "Sparerib Kid," "Watermelon Man," or "Watermelon Kid." He referred to the plaintiff as "Boy," or "his Boy." In some instances the plaintiff was referred to in these terms by other employees in the presence of Brennan. Brennan also told the plaintiff in the presence of some of his fellow-employees that he had seen a dead coon

in the road and suggested that the plaintiff take it home and make stew for his family. In another instance, when there were donuts in the office, Brennan told the plaintiff that he couldn't have them because they had not been fried in chicken fat or chicken grease. A sign entitled "Chicken Little," or "Love that Chicken," was placed on the plaintiff's "IN" box in the office. The plaintiff complained to Ambrosie, a vice-president of the company, that this was offensive to him, but nothing was done by Ambrosie to see to its removal. The sign stayed up approximately three weeks.

5. The plaintiff's fellow-employees, as well as the plaintiff, interpreted this name-calling as evidencing stereotyped concepts of the eating habits of black people.

6. This conduct on behalf of Brennan was demeaning and humiliating to the plaintiff. He felt he was being put down as an individual

and as a black man. He deferred, however, making an immediate complaint concerning the conduct because he had been counselled while still in the military that as a recent convert from military to civilian life, there were changes he would have to accept and he felt perhaps this was a "hazing" of a new employee which would cease. It did not.

7. In March of 1989, the plaintiff decided to do something about the situation and he told Brennan that he was "fed up." Brennan replied that the plaintiff was too sensitive; he laughed it off; and he stated that "sticks and stones will break my bones, but words will never hurt me," or words to that effect. The name calling continued after the plaintiff's complaint to Brennan, and continued until June of 1989 when the plaintiff went to see Beavers, a senior vice-president of the defendant. To Beavers he com-

plained of the racially oriented name calling and various other matters concerning his work assignment and sick leave. This first meeting occurred while Brennan had already left on a there or four day trip, and Beavers promised to fully investigate the plaintiff's complaints when he, Beavers, returned from a trip he also was planning.

8. Upon Beavers' return, he discussed the matter with Brennan. Brennan admitted calling the plaintiff Chicken Little and Watermelon Man; however, he contended that it was only kidding. Beavers instructed Brennan that the name calling and kidding should cease. Brennan was upset when told that the plaintiff had complained to Beavers.

9. At a meeting on June 28, 1989, attended by the plaintiff, Beavers, Cook, Brennan and Wilson, all parties felt the matter had been resolved and the plaintiff proffered

his satisfaction with the resolution of the matter. At or about this time the plaintiff's fellow-employee, Tolly, who had suggested to the plaintiff that the plaintiff complain to Beavers, was fired. Another fellow-employee, Ceeba, told the plaintiff his days were numbered at the bank and that Brennan would not forgive him for going over his head to Beavers. The plaintiff became "scared" and submitted an application to Marriott for part-time work. He advised Brennan of this on July 10. He never obtained employment for full or part-time work since there was no job available with Marriott for 8-10 months because of lack of funding.

10. On July 20, 1989, the plaintiff was injured on the job and on July 25, 1989, Brennan called the plaintiff at home and told him they had accepted his resignation. The plaintiff denied that he had ever resigned and

Brennan said he would send the plaintiff a letter concerning this. That letter (PX-17) shocked and surprised the plaintiff, and he responded in a letter (PX-18) expressing this shock and surprise, denying that he had resigned, and, in effect, asked for his job back.

11. The court rejects the defendant's assertion that the plaintiff resigned on July 10, 1989. Both Cook, who was also one of the plaintiff's supervisors, and Beavers were told by Brennan that the plaintiff had resigned. Beavers was surprised.

12. The court also rejects the assertions that the name calling was only meant in fun, and that no intimidation or references to chicken were motivated by the plaintiff's obsessive appetite for chicken. The very making of the argument that such remarks can be considered "fun" or "joking" is the same

mind-set that finds it acceptable, as Brennan testified, to call his fellow-employee Schlandensky a Pollack, and to argue that because the plaintiff allegedly referred to himself on several occasions as a "nigger," this somehow makes benign the application of names to him which are racial stereotypes. The insensitivity that prompts such assertions has helped proved the plaintiff's case.

The defendants are not entirely guileless, moreover. Their first reaction was to deny that the name-calling occurred (See Ans. to Interrogatories Nos. 5 and 10). When it became apparent that such a denial was spurious, they resorted to a belittlement of the claim by characterizing the conduct as the type of kidding and joking that normally goes on in the workplace; not to be taken seriously; and a suggestion that the brunt of the name-calling was being overly sensitive. The

defendants have still, to this day, not acknowledged or apparently even recognized, the humiliation that such conduct inflicts.

13. The court finds that the name-calling constituted racial harassment; that the plaintiff's termination and the defendant's refusal to re-hire him were in retaliation for the plaintiff's complaints to Beavers concerning the racial harassment by Brennan; and that this conduct constitutes discrimination on account of race in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§2000e et seq.

Liability of Brennan

The defendants assert because Brennan was not a named respondent in the plaintiff's E.E.O.C. complaint he must be dismissed from the plaintiff's Title VII claim. Defendant relies on Dickey v. Greene, 710 F.2d 1003 (4th Cir. 1983). The decision in that case was

vacated and is not binding precedent. Dickey v. Greene, 729 F.2d 957 (4th Cir. 19840. Moreover, the court finds that the E.E.O.C. complaint, as amended, clearly put both defendants on notice of the plaintiff's claim against Brennan.

Statute of Limitations

Defendants claim that the failure of the plaintiff to file his claim with the E.E.O.C. within 180 days of the alleged unlawful employment practice as required by 42 U.S.C. §2000e-5(e) bars his claim. Virginia, however, is a so-called "deferral state," and consequently the plaintiff had a 300 day filing period. E.E.O.C. v. Hansa Products, Inc., 844 F2d 191 (4th Cir. 1988). Plaintiff's Title VII claim is accordingly not time barred.

Relief

During trial the plaintiff withdrew any claim for back wages or reinstatement, requesting only declaratory relief and nominal damages insofar as his Title VII claim was concerned. The court finds that such declaratory relief is appropriate, as are nominal damages. The declaration should act as a deterrent. The court will, therefore, enter an order declaring that the plaintiff's rights under Title VII have been violated by the racial harassment on the job and by a termination and failure to re-hire in retaliation for his complaints of racial harassment on the job. Nominal damages in the amount of $100.00 will be awarded together with costs, including attorney's fees.

/S/
United States
District Judge

Alexandria, Virginia
July 20th, 1990

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA

Alexandria Division

ROBERT L. HOLLAND,	)	
	)	
Plaintiff,	)	
	)	
v.	)	C.A. #90-64-A
	)	
FIRST VIRGINIA BANKS, INC., et al.,	)	
	)	
Defendants.	)	

O R D E R

For the reasons set forth in the Memorandum Opinion this day filed, it is hereby ORDERED and DECLARED that:

1. The conduct of the defendants violates Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e, et seq.,

2. Damages in the amount of $100.00 are awarded against the defendants First Virginia Banks, Inc., and Donald G. Brennan, jointly

and severally.

3. Attorney's fees and costs are awarded to the plaintiff, and the court will consider the amount thereof after submission by counsel for the plaintiff his request therefor within thirty days from July 12, 1990, and after a twenty day response period for the defendants, as directed with regard to the claim pursuant to 42 U.S.C. §1981.

/S/
United States
District Judge

Alexandria, Virginia
July 20th, 1990

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED
August 20, 1991

No. 90-2203

ROBERT L. HOLLAND,

Plaintiff-Appellee,

v.

FIRST VIRGINIA BANKS, INC., et al.,

Defendants-Appellants.

On Petition for Rehearing with Suggestion for Rehearing in Banc

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The appellee filed a petition for rehearing with suggestion for rehearing in banc. No member of the Court requested a poll on the suggestion for rehearing in banc, and the original judicial panel voted to deny the petition for rehearing.

The Court denies the petition for rehearing with suggestion for rehearing in banc.

Entered at the direction of Judge Ervin, with the concurrence of Judge Niemeyer and Judge Restani.

For the Court,

/S/
Clerk

SUPREME COURT OF THE UNITED STATES

No. A-295

Robert L. Holland,

Petitioner

v.

First Virginia Banks, Inc. and Donald Brennan

ORDER

UPON CONSIDERATION of the application of counsel for the petitioner,

IT IS ORDERED, that the time for filing a petition for a writ of certiorari in the above-entitled case, be and the same is hereby, extended to and including December 16, 1991.

/S/ William H. Rehnquist
Chief Justice of the
United States

Dated this 29th
day of October, 1991.

Supreme Court, U.S.
FILED
JAN 17 1992
OFFICE OF THE CLERK

No. 91-974

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1991

ROBERT LEE HOLLAND,

Petitioner,

vs.

FIRST VIRGINIA BANKS, INC.
AND
DONALD BRENNAN,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION

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*Counsel of Record

QUESTIONS PRESENTED

1. Whether the Civil Rights Act of 1991 should be applied retroactively by this Court to reopen a decision below which was demonstrably correct when issued.

2. Whether the Courts of Appeals have correctly interpreted this Court's decision in *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989), to bar claims of racially discriminatory discharge under the Civil Rights Act of 1866.

PARTIES TO THE PROCEEDING

The names of all of the parties appear in the caption. Respondent First Virginia Banks, Inc. has no parent company. All subsidiaries of First Virginia Banks, Inc. are wholly owned by that entity.

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No. 91-974

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1991

ROBERT LEE HOLLAND,

Petitioner,

vs.

FIRST VIRGINIA BANKS, INC.
AND
DONALD BRENNAN,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION

STATUTORY PROVISION INVOLVED

At the time the decision below was rendered, 42 U.S.C. §1981 read as follows:

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

COUNTERSTATEMENT OF THE CASE

I. PROCEDURAL HISTORY

Petitioner Robert L. Holland commenced this action on January 18, 1990, by filing a complaint in the United States District Court of the Eastern District of Virginia. Mr. Holland named as defendants in the action the Respondents herein — First Virginia Banks, Inc. ("the Holding Company"), his former employer; and Donald D. Brennan, his former supervisor. In his original complaint, Mr. Holland alleged that he was subjected to racial harassment while employed by the Holding Company and that, because he complained about such harassment, his employment was terminated. Mr. Holland later amended his complaint to add the assertion that the Holding Company refused to reinstate him to employment because he had complained about the alleged harassment. Mr. Holland claimed that this conduct violated Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, et seq. ("Title VII"), the Civil Rights Act of 1866, 42 U.S.C. § 1981 ("Section 1981"), and constituted intentional infliction of emotional distress under the laws of the Commonwealth of Virginia.

On February 26, 1990, the Holding Company and Mr. Brennan filed a motion to dismiss Mr. Holland's complaint in its entirety. In support of that motion, they argued, *inter alia*, that Mr. Holland's allegations failed to state a claim for relief under Section 1981 in light of this Court's pronouncements in *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989) ("*Patterson*"). The district court denied this motion by order dated March 30, 1990.

Trial in this matter commenced on July 10, 1990, before the Honorable Albert V. Bryan, Jr., with Mr. Holland's claims under Section 1981 and Virginia common law to be tried to the jury and his claims under Title VII to be adjudicated by Judge Bryan. On July 11, 1990,

at the close of plaintiff's evidence, defendants moved for a directed verdict. The Holding Company and Mr. Brennan again argued, *inter alia*, that any claims arising out of the alleged harassment of Mr. Holland and the Holding Company's alleged failure to continue Mr. Holland's employment were not actionable under Section 1981 because, as a matter of law, such conduct did not interfere with Mr. Holland's right as protected under Section 1981 "to make and enforce contracts."

Ruling from the bench, the district court agreed that Mr. Holland's claims under Section 1981 of unlawful harassment and termination from employment could not be submitted to the jury. However, the district court refused to enter judgment for defendants on all of Mr. Holland's Section 1981 claims on the grounds that "the jury can interpret that, if [Mr. Holland] has been fired, he wants his job back." The district court reasoned that "there is sufficient evidence to go to the jury on the 1981 [sic] on the claim that he was denied reinstatement, which would be a new contract."

On July 12, 1990, the jury returned a verdict in favor of the defendants on the state law infliction of emotional distress count and in favor of Mr. Holland on the Section 1981 count. The jury awarded Mr. Holland $20,000 in compensatory damages for emotional distress and $501,000 in punitive damages. On July 20, 1990, the district court entered findings of fact and conclusions of law in favor of Mr. Holland on his Title VII claim. The district court awarded Mr. Holland $100 in nominal damages for this claim, in addition to costs and attorneys' fees. By order dated September 7, 1990, the district court awarded Mr. Holland a total of $87,388.13 in costs and attorneys' fees.

The Holding Company and Mr. Brennan filed a timely post-trial motion under Rules 50(d) and 59 of the Federal Rules of Civil Procedure, requesting a judgment notwithstanding the verdict or, in the alternative, a new trial. The district court denied this motion in an order dated September 7, 1990.

The Holding Company and Mr. Brennan appealed the judgment of the district court on Mr. Holland's Section 1981 claim to the United States Court of Appeals for the Fourth Circuit. Mr. Holland did not appeal any aspect of the district court's judgment and, in particular, did not appeal the district court's ruling that Mr. Holland's termination claim could not be presented to the jury under Section 1981. On July 12, 1991, the Fourth Circuit reversed and vacated the district court's entry of judgment for Mr. Holland and his § 1981 claim, ruling that "the evidence is insufficient to permit a reasonable jury to find that the [Holding Company] refused to enter into a new employment contract with Holland." *Holland v. First Virginia Banks*, Inc., No. 90-2203 (unpublished slip. op. at 7.) (attached as Appendix A to the Petition for *Certiorari*).

By order dated, August 20, 1991, the Fourth Circuit denied Mr. Holland's motion for rehearing *en banc*. On November 22, 1991, Mr. Holland requested the Fourth Circuit to recall its mandate for the purposes of determining whether its prior decision should be altered in light of the enactment on November 21, 1991 of the Civil Rights Act of 1991. By Order dated December 17, 1991, the Fourth Circuit denied Mr. Holland's request without opinion. On December 16, 1991, Mr. Holland filed the instant petition for *certiorari* with this Court. The Holding Company and Mr. Brennan were served with the petition on December 18, 1991.

II. THE FACTS

Almost all of the evidence that Mr. Holland adduced at trial related to his claim that he was racially harassed. Specifically, Mr. Holland testified that during his employment with the Holding Company, Mr. Brennan and other employees of the Holding Company called him numerous names that he construed as racial epithets. Mr. Holland further testified that in approximately March 1989, he attempted to discuss the name-calling with Mr. Brennan in an effort to resolve the matter, and

that Mr. Brennan's response was that Mr. Holland was "too sensitive."

In mid-June of 1989, Mr. Holland went to see Shirley Beavers, a senior vice president of the Holding Company, to complain about the name-calling, as well as various other matters concerning his work assignments and sick leave. Mr. Beavers testified that this was the first occasion on which he became aware of Mr. Holland's problems at work.

Shortly thereafter, Mr. Holland had another meeting with Mr. Beavers, at which time Mr. Brennan was also present. At this meeting, Mr. Beavers stated to Mr. Holland that the name-calling would stop. Mr. Beavers testified that at that meeting, as well as on several other occasions, he instructed all individuals involved, including Mr. Brennan, that there should be no name-calling in the office. After Mr. Holland's initial meeting with Mr. Beavers, the name-calling stopped and did not resume.

On July 20, 1989, Mr. Holland was injured on the job and was unable to go to work. Mr. Holland testified that, on July 25, 1989, Mr. Brennan called him at home and told Mr. Holland that he had accepted Mr. Holland's resignation.[1] Mr. Holland responded that he had never resigned. Mr. Holland subsequently received a letter from Mr. Brennan that purported to "confirm our acceptance of your resignation of employment." The letter further stated that, while it was unnecessary for Mr. Holland to come to work through his termination date of August 11, 1989, Mr. Holland would be paid his normal pay rate through that date.

Mr. Holland responded to Mr. Brennan's letter with his own letter dated August 1, 1989, wherein Mr. Holland stated that he had "never submitted any letter of

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1. Mr. Brennan testified that, on July 10, 1989, Mr. Holland came into his office and informed Mr. Brennan that he was resigning. Mr. Brennan also testified that he and Mr. Holland subsequently agreed that Mr. Holland's last day of employment would be August 11, 1989. Mr. Holland denies that these conversations took place.

resignation nor given any verbal indication of resignation." The letter to Mr. Brennan also stated that "since a resignation has not been given to you, I refuse to accept your letter of acceptance." The letter concluded with the "request that I be given a thorough explanation of your intentions regarding my employment with 1st Virginia Bank."

By letter dated August 7, 1989, Mr. Beavers responded to Mr. Holland's August 1 letter to Mr. Brennan. In that letter, Mr. Beavers stated that "our position is that you resigned on July 10, 1989," and that "there was no misunderstanding regarding your intent to terminate your employment." The letter concluded that the Holding Company would "continue to pay you as if you were employed with us through August 11, 1989."

REASONS FOR DENYING THE WRIT

I. THE COURT SHOULD NOT GRANT REVIEW TO DETERMINE WHETHER THE CIVIL RIGHTS ACT OF 1991 SHOULD BE APPLIED RETROACTIVELY TO CASES THAT WERE DEMONSTRABLY CORRECT WHEN DECIDED.

Retroactivity of the Civil Rights Act of 1991 is the answer, Mr. Holland contends, to the "quirk of fate that has taken away [his] judgment." (Petition for *Certiorari* at 9-11) The unanimous view of the Courts of Appeals that Section 1981 does not cover termination claims after *Patterson* belies any notion that fate determined the outcome below. On the contrary, the decision below was eminently correct when made and the subsequent passage of the Civil Rights Act of 1991 cannot be deemed to render it incorrect unless this Court is prepared to reopen every Section 1981 case decided since *Patterson*.

Moreover, the question of the retroactivity of the Civil Rights Acts of 1991 should not be considered by this Court when no Court of Appeals has yet considered the issue, including the Court of Appeals from which

this petition arises. To date, several district courts have considered the issue of retroactivity of the Civil Rights Act of 1991. The better reasoned decisions hold that the statute should not be applied retroactively, while other decisions have reached the opposite conclusion. Presumably, these district court decisions will be reviewed by the Courts of Appeals. If a split develops at the Circuit level, this Court can consider at that time whether the issue needs to be resolved by this Court. Until such time, granting review on the issue would be premature.

The granting of *Certiorari*, followed by a remand order, should likewise not occur where this Court's prior decisions, if followed, would result in a decision here that the statute is not retroactive. Review by this Court need not occur where prior Supreme Court precedent provides clear guidance to the lower courts and the trend of the decisions is consistent with that guidance. As Justice Stevens has observed, "the Court seldom takes a case merely to reaffirm settled law." *Estelle v. Gamble*, 429 U.S. 97, 115 (1976) (dissent). That situation now exists on the issue of the retroactivity of the Civil Rights Act of 1991.

In a nutshell, the rationale given by those district court decisions holding that the Civil Rights Act of 1991 should not be applied retroactively is threefold: (1) retroactivity is not favored by the law, *Bowen v. Georgetown Univ. Hospital*, 488 U.S. 204, 208 (1988); (2) nothing in the Civil Rights Act of 1991 indicates that Congress intended the Act to apply retroactively — Section 402(a) states that "[e]xcept as otherwise specifically provided this Act and the amendments made by this Act shall take effect upon enactment"; and (3) the legislative history amply demonstrates that Congress intended that the Act not be applied to cases pending at the time of its enactment. *See, e.g., Van Meter v. Barr*, No. 91-0027 (D.D.C. Dec. 18, 1991).

The Act's legislative history, while not necessary to confirm its prospective application, demonstrates that

interpretation unmistakenly. Thus, the most "authoritative guide" to a statute's construction, the remarks of the sponsors (*North Haven Board of Education v. Bell*, 102 S. Ct. 1912, 1921 (1982)), establishes that the Civil Rights Act of 1991 applies prospectively only. The Interpretive Memorandum, setting forth the views of every one of the Act's co-sponsors (with the exception of Senator Kennedy), states unambiguously:

> The bill provides that, unless otherwise specified, the provisions of this legislation shall take effect upon enactment and shall not apply retroactively.

137 Cong. Rec. S15,485 (Oct. 30, 1991) (emphasis added).

In addition, the primary Republican sponsor, Senator Danforth, introduced the sponsors' Interpretive Memorandum with the following comments:

> My review of Supreme Court case law supports my reading that in the absence of an explicit provision to the contrary, no new legislation is applied retroactively. Rather, new statutes are to be given prospective application only, unless Congress explicitly directs otherwise, which we have not done in this instance. Support for this proposition is derived from Justice Scalia's concurring opinion in *Kaiser Aluminum & Chemical Corp. v. Bonjorno*, 110 S.Ct. 1570, 1579 (1990), and the unanimous opinion of the Supreme Court in *Bowen v. Georgetown University Hospital*, 488 U.S. 204, 208 (1988), and the numerous cases cited by Justice Kennedy in *Bowen*.
>
> I acknowledge that there appear to be two cases that do not adhere to this principle but instead support retroactive application of new statutes in the absence of "manifest injustice." *Bradley v. Richmond School Board*, 416 U.S. 696 (1974); *Thorpe v. Housing Authority of Durham*, 393 U.S. 268 (1969). The sponsors disapprove of these cases.

> Our intention in drafting the effective date provision was to adhere to the principle followed by the vast majority of Supreme Court cases and exemplified by *Bowen* and Justice Scalia's concurrence in *Bonjorno*.
>
> Subsection 22(b), regarding certain disparate impact cases, is intended only to provide additional assurance that the provisions of the bill will not be applied to certain cases that fit the provisions of that subsection. It should not be read in derogation of the sponsors' intention not to provide for retroactive effect or application as expressed in subsection 22(a) of the bill.

137 Cong. Rec. S15,483.

Only a single sponsor had a somewhat different view. Senator Kennedy stated that:

> It will be up to the courts to determine the extent to which the bill will apply to cases and claims that are pending on the date of enactment. Ordinarily, courts in such cases apply newly enacted remedies and procedures to pending cases.

137 Cong. Rec. 15,485 (Oct. 30. 1991).

Senator Kennedy's single statement, however, does not controvert the authoritative intent of the Act's sponsors. First, the remarks of a single Senator, even if he is a sponsor, do not bear much weight. *Consumer Product Safety Commission v. G.T.E. Sylvania, Inc.*, 100 S. Ct. 2051 (1980). Second, Senator Kennedy did not express any "intent" to apply the Act retroactively. His "intent" was for the courts to decide. 137 Cong. Rec. 15,485 (Oct. 30. 1991). Third, Senator Kennedy stated only that he understood the courts to apply "newly enacted remedies and procedures" to pending cases.

Moreover, the overwhelming weight of the remainder of the legislative statements corroborates the sponsors' intent that the Act not apply to pending cases. For example, Senators Dole, Burns, Cochran, Garn, Gorton,

Grassley, Hatch, Mack, McCain, McConnell, Murkowski, Simpson, Seymour and Thurmond, along with the Administration, submitted a separate Interpretive Memorandum that provides:

> Section 22 specifies that the Act and the amendments made by the Act take effect upon enactment. Accordingly, they will not apply to cases arising before the effective date of the Act. *See Bowen* [*supra*]; *Kaiser* [*supra*] (declining to resolve conflict between *Georgetown University Hospital and Bradley* [*supra*]).

137 Cong. Rec. S15,478 (Oct. 30, 1991).[2]

In the face of such overwhelming legislative history demonstrating the absence of any intent by the sponsors of the Civil Rights Act of 1991 that it apply retroactively, there exists no need whatsoever for this Court to grant *certiorari* or grant *certiorari* coupled with a remand order for consideration of the issue.

II. THE COURT SHOULD NOT GRANT REVIEW TO DECIDE WHETHER ITS OPINION IN *PATTERSON V. MCLEAN CREDIT UNION* PRECLUDES CLAIMS OF DISCRIMINATORY TERMINATION UNDER SECTION 1981.

Mr. Holland seeks review to determine whether the Courts of Appeals are incorrect in their unanimous view that *Patterson* bars claims of discriminatory discharge under Section 1981. Mr. Holland, however, did not preserve this issue on appeal and accordingly may not seek review here. Moreover, there is no conflict in the decisions of the Courts of Appeals on this issue or any other special and important reasons that would warrant granting review on this issue.

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2. See also the respective statements of Senators Gorton, Durenberger and Simpson (137 Cong. Rec. S15,966 (October 30, 1991)) and Representatives Hyde and LaFalce. (137 Cong. Rec. H9513, 9553 (Nov. 7, 1991)).

A. Petitioner Failed to Appeal the District Court's Ruling That His Termination Claim Could Not Be Pursued Under Section 1981.

As noted above, while the district court allowed Mr. Holland to attempt to convince the jury that there was a separate, racially motivated refusal to rehire him, the district court ruled that Mr. Holland could not pursue his Section 1981 claim that the Holding Company's decision to terminate his employment was discriminatory. Mr. Holland did not appeal this latter ruling by the district court. Indeed, Mr. Holland did not appeal at all from the district court's judgment. Instead, he elected solely to defend the district court's ruling that there was sufficient evidence to present a discriminatory refusal to rehire claim to the jury and the resulting verdict. As a consequence of Mr. Holland's decision, the Fourth Circuit was not asked to decide the purely legal question as to whether racially motivated discharges are actionable under Section 1981. Instead, the Fourth Circuit's consideration was limited to whether there was any evidence to support submitting a separate refusal to rehire claim to the jury under Section 1981.

This Court ordinarily does not decide questions not raised or involved in the lower court. *Delta Airlines v. August*, 450 U.S. 346, 362 (1981); *United States v. Santana*, 427 U.S. 38, 41 n.2 (1976); *Duignan v. United States*, 274 U.S. 195, 200 (1927). For example, in *Delta Airlines* the petition for certiorari presented the issue of a district judge's abuse of discretion in denying the petitioner's costs under Rule 54 of the Federal Rules of Civil Procedure. The Court refused to review this issue. The Court held that the "question [of the district judge's abuse of discretion] was not raised in the Court of Appeals and is not properly before us." *Id.* at 362.

In *Duignan*, the petitioner sought, in part, to have the Court review the constitutionality of the forfeiture of his leasehold under Section 23 of Title II of the National Prohibition Act. The Court found that "[t]he court below

in enumerating the questions raised and presented made no mention of the constitutional question." *Id.* at 200. The Court also found that "[t]he assignment of errors below did not refer specifically to it as required by the rules of that court, and so far as the record discloses it was not presented there." *Id.* In denying *certiorari*, the Court reasoned that "[i]t is only in exceptional cases coming here from the federal courts that questions not pressed or passed upon below are reviewed." *Id.*

Accordingly, applying the long-standing principle of this Court not to review an issue that was not raised properly below, this Court should deny the petition for *certiorari* on the issue of whether racially motivated terminations are actionable under Section 1981 in light of the *Patterson* decision.

B. There is No Conflict In The Courts Of Appeals or Any Other Special and Important Reason For Granting Review on Mr. Holland's Termination Claim Under Section 1981.

Even if Mr. Holland had preserved the issue of whether discharge claims are actionable under Section 1981, that issue is not appropriate for review in this Court. The primary criterion for granting *certiorari* is the existence of conflicting decisions on an issue in the lower courts. *See* Supreme Court Rule 10.1(a). No such conflict exists as to the actionability of discharge claims under Section 1981. All eleven Circuits have considered that issue and all eleven have reached the same conclusion: in light of this Court's decision in *Patterson*, allegations of discriminatory discharge from employment do not state a claim under Section 1981.[3]

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3. *Taggart v. Jefferson Co. Child Support Enforcement Unit*, 935 F.2d 947 (8th Cir. 1991); *Gersman v. Group Health Ass'n Inc.*, 931 F.2d 1565 (D.C. Cir. 1991); *Trujillo v. Grand Junction Regional Center*, 928 F.2d 973, 976j (10th Cir. 1991); *Williams v. First Union Nat'l Bank*, 920 F.2d 232, 233-34 (4th Cir. 1990), *cert. denied*, 111 S. Ct. 2259 (1991); *Prather v. Dayton Power & Light Co.*, 918 F.2d 1255, 1256-58 (6th Cir. 1990), *cert. denied*, 111 S. Ct.

Indeed, this Court previously granted *certiorari* to review the sole appellate decision that had held to the contrary, *Hicks v. Brown Group, Inc.*, 902 F.2d 630 (8th Cir. 1990) ("*Hicks*"). Following the grant of review, this Court vacated the judgment that had been entered in *Hicks* on the Section 1981 discharge claim and remanded the case for further consideration in light of the Eighth Circuit's *en banc* opinion to be filed in *Taggart v. Jefferson County Child Support Enforcement Unit*, 915 F.2d 396 (1990), another case raising the issue of whether discharge claims are actionable under Section 1981. *Brown Group, Inc. v. Hicks*, 111 S. Ct. 1299 (1991).[4] In other words, this Court has already granted *certiorari* on the issue Mr. Holland raises here and has eliminated any conflict that existed in the lower courts.[5]

Fn. 3 (*Cont.*)

2889 (1991); *Thompkins v. DeKalb County Hosp. Auth.*, 916 F.2d 600, 601 (11th Cir. 1990); *Gonzalez v. Home Ins. Co.*, 909 F.2d 716, 722 (2d Cir. 1990); *McKnight v. General Motors Corp.*, 908 F.2d 104, 108-09 (7th Cir. 1990), *cert. denied*, 111 S. Ct. 1306 (1991); *Courtney v. Canyon Television & Appliance Rental, Inc.*, 899 F.2d 845, 849 (9th Cir. 1990); *Lavendar v. V & B Transmissions & Auto Repair*, 897 F.2d 805, 807-08 (5th Cir. 1990); *Hayes v. Community General Osteopathic Hospital*, 940 F.2d 55 (3d Cir. 1991).

4. The Eighth Circuit subsequently issued its *en banc* opinion, holding that Section 1981 does not cover discriminatory discharges. *Taggart*, 935 F.2d at 948 (8th Cir. 1991).

5. No other special or important reasons exist for granting review on this issue. To the extent that the Civil Rights Act of 1991 overrules *Patterson* and makes discriminatory discharges actionable under Section 1981, the issue that Mr. Holland seeks review on is not one that will arise in the lower courts in the future. While the issue may be of importance to Mr. Holland personally, it is not an issue that has any significant importance for the public generally and, accordingly, does not warrant review in this Court. *Layne & Bowler Corp. v. Western Well Works*, 261 U.S. 387, 393 (1923).

CONCLUSION

Supreme Court review to determine whether the Civil Rights Act of 1991 should be applied to cases already decided is not warranted because there has been no consideration of that issue by the Court of Appeals in this case, nor by any other Court of Appeals. Further, it is a matter of settled law in this Court that statutory enactments such as the Civil Rights Act of 1991 will not be applied retroactively absent express Congressional intent. Congress did not express such an intent in the Civil Rights Act of 1991.

In addition, Supreme Court review to determine whether discriminatory discharges are actionable under Section 1981 is not warranted in this case because the issue was not preserved below. Moreover, the lower courts are unanimous in their view that this Court's decision in *Patterson* clearly precludes discharge claims under Section 1981.

Accordingly, the petition for a writ of *certiorari* should be denied.

Respectfully submitted,

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No. 91-974

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PETITION FOR WRIT OF CERTIORARI TO
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PETITIONER'S REPLY BRIEF

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January 23, 1992

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Petitioner Robert Lee Holland replies as follows to the respondents' brief opposing the issuance of a writ of certiorari.

Procedural Note

At the time petitioner filed his petition for writ of certiorari, there was pending in the Fourth Circuit Court of Appeals petitioner's motion to recall mandate in light of the enactment of the Civil Rights Act of 1991. On December 17, 1991, the court of appeals denied this motion by order entered without opinion.

Respondents' Brief Confirms the Appropriateness of The Court's Expedited Consideration of Whether the Civil Rights Act of 1991 Applies to Pending Cases

Respondents point out, at 7, that in the weeks since the President signed into law the Civil Rights Act of 1991, it has been held inapplicable to pending cases. At latest

count, the act has been held to apply to pending cases in Stender v. Lucky Stores, Inc., No. C-88-1467 (N.D. Cal., Dec. 19, 1991); King v. Shelby Med. Center, No. 91-AR-2258-S (N.D. Ala., Dec. 18, 1991); Davis v. Tri-State Mack Distributions, Inc., No. LR-C-89-912 (E.D. Ark., Dec. 16, 1991); Mojica v. Gannett Co., Inc., No. 90-C-3827 (N.D. Ill., Dec. 6, 1991); and La Cour v. Harris County, No. H-89-1532 (S.D. Tex., Dec. 6, 1991). It has been held not to apply to pending cases in Van Meter v. Barr, 57 FEP Cases 769 (D.D.C., Dec. 18, 1991), motion for certification to Court of Appeals under 28 U.S.C. §1292(b) granted, Jan. 10, 1992; Hansel v. Public Service Co., 1991 U.S. Dist. Lexis 17904 (D. Colo., Dec. 11, 1991); James v. American Int'l Recovery, Inc., C.A. No. 1:89-CV-321-RHH (N.D. Ga., Dec. 3, 1991); and Alexandre v. AMP, Inc., 57 FEP Cases 768 (W.D. Pa., Dec. 5,

1991). In related developments, the Equal Employment Opportunity Commission has ruled that the 1991 act is not retroactive, 60 U.S.L.W. 2418 (Dec. 27, 1991), and as a result has been sued in Nat'l Treasury Employees Union v. Kemp, No. C92-0115 (N.D. Cal., filed Jan. 2, 1992) for alleged violation of E.E.O.C. claimants' rights under the current law.

In the words of the court in Van Meter, 57 FEP Cases at 769, supra, there prevails a "state of total confusion" regarding the applicability of the 1991 act to pending cases. The issue has now been presented to this Court in at least the following cases (in addition to the instant one) in which certiorari is being sought: Hicks v. Brown Group, Inc., No. 90-324 and Gersman v. Group Health Assoc., Inc., No. 91-724. The problem is further exacerbated by the recognized uncer-

tainty in the law of retroactivity. See, Kaiser Aluminum & Chem. Corp. v. Bonjorno, 110 S. Ct. 1570, 1577 (1990). There exists no clear rule to guide the lower courts, and it is the judiciary that will now reap what Congress has recently sown.

The full consequences of the confusion which the judiciary has inherited from Congress will become clear when it is definitively decided, as it must be at some point, whether the 1991 act is or is not applicable to pending cases. For at that time it will become necessary to contend with all the cases which will end up having been "wrongly" adjudicated. The longer the issue remains unresolved, the greater the backlog of such cases, the greater the resulting inequity, and the greater the burden on the judiciary in coping with the consequences. These "bureaucratic" matters are properly of concern to this Court,

given, especially, the vast number of employment discrimination cases pending when the new law was enacted.[1] Cf. Laing v. United States, 423 U.S. 161, 167 (1976).

For these reasons, it is appropriate for the Court to remand this case to the Fourth Circuit for reconsideration in light of the 1991 act. It would be up to this Court whether and to what degree to opine, in a remand order, on the applicability of the Civil Rights Act to pending cases. Obviously, judicial economy will be substantially enhanced were the Court to address the merits of this issue sooner rather than later. Cf., Weinberger v. Ramirez de Arreland, 471 U.S. 1113 (1985) (granting, vacating and remanding

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[1]For this reason, the district court in Van Meter, supra, on January 10, 1992 granted plaintiff's motion in that case for an interlocutory appeal of its adverse decision on this issue.

in banc opinion of the District of Columbia Circuit for consideration of the Foreign Assistance and Related Programs Appropriations Act, Pub. L. No. 98-473 (1985)); Immigration and Naturalization Service v. Nat'l Center for Immigrants' Rights, 481 U.S. 1009 (1987) (granting, vacating and remanding decision of the Ninth Circuit for consideration of the Immigration Reform and Control Act of 1986, Pub. L. No. 99-603 (1986)); Union Gas Co. v. Pennsylvania, 479 U.S. 1025 (1987) (granting, vacating and remanding opinion of the Third Circuit for consideration of the Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499 (1986)).

Petitioner's Termination Claim
Is Properly Before This Court

Respondents point out that petitioner did not note an appeal of the issue of whether discriminatory discharge remained actionable under §1981 after Patterson. This is true but of no consequence here. In defending respondents' appeal, petitioner raised and fully briefed this very issue at length. See appellee's brief at 17-18, 34-41. It was also a principal subject of his motion for reconsideration in banc.[2] Petitioner did not have to file a cross-appeal in order to raise this issue since the argument was presented to protect an existing judgment, by demonstrating an alternative ground for reaching the same result. United States v. American Railway

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[2]Mr. Holland also contended that only the appellate court sitting in banc, and not an appellate panel, could change the court's previously-stated position that §1981 bars discriminatory discharge.

Express Co., 265 U.S. 425, 435 (1924); cf. Thurston v. United States, 810 F.2d 438, 447 (4th Cir. 1987).[3] Respondents' citation to settled authority arising out of a party's failure to mention an issue below is inapposite.

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[3]The bank argued on appeal that Mr. Holland's failure to be rehired was not distinguishable from his discharge. Had the court of appeals permitted a discharge claim under §1981, Mr. Holland would have kept his verdict.

Conclusion

For these reasons and those stated in the initial petition filed herein, the Court should issue a writ of certiorari to review the Fourth Circuit's decision in this case.

Respectfully submitted,

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Dated: January 23, 1992

PRB.HL

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No. 91-974

In The
SUPREME COURT OF THE UNITED STATES

October Term, 1991

ROBERT LEE HOLLAND,

Petitioner,

v.

FIRST VIRGINIA BANKS, INC.

and

DONALD BRENNAN,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITIONER'S SUPPLEMENTARY BRIEF

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January 28, 1992

Petitioner respectfully brings to the attention of the Court that on January 27, 1992, this Court, by summary order, granted the petition for writ of certiorari in the case of Gersman v. Group Health Assoc., Inc., No. 91-724, vacated the decision of the United States Court of Appeals for the District of Columbia Circuit in that case, and remanded the case to the court of appeals for reconsideration in light of the enactment of the Civil Rights Act of 1991.

In the instant case, petitioner Robert Lee Holland seeks precisely the relief granted in Gersman. Indeed, in petitioner's reply brief, filed January 23, 1992, petitioner made express reference to the fact that the principal issue presented in the instant case -- the applicability of the Civil Rights Act to pending cases -- was before the court in Gersman.

Petitioner Holland respectfully submits that the same considerations which led this Court to grant, vacate and remand in Gersman are applicable here, and should thus lead to the same result here as obtained in Gersman.

Respectfully submitted,

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